TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 105.

J. O. COMSTOCK, APPELLANT,

vs.

WILLIAM L. EAGLETON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED AUGUST 15, 1904.

(19,048.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1904.

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a THE UNITED STATES OF AMERICA, ss:

The President of the United States to Wm. L. Eagleton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the supreme court of the Territory of Oklahoma, and filed in the clerk's office of said court on the 10th day of June 1903, in a cause wherein J. O. Comstock is appellant, and you, the said Wm. L. Eagleton, are appellee, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 10th day of June A. D. 1903.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Service of a copy of the within citation is hereby admitted this 12th day of June A. D. 1903.

A. J. BIDDISON,
Attorney for Appellee.

[Endorsed:] 1157. Comstock *vs.* Eagleton. Citation and proof of service thereof. Filed June 24, 1903. Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

1 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Appellant,
vs.
WM. L. EAGLETON, Appellee. } Case No. 1157.

Petition for Appeal.

The above named appellant respectfully represents and shows to the court that the above entitled cause is now pending in the supreme court of the Territory of Oklahoma, and that a judgment and final decree has therein been rendered on the 16th day of July, 1902, affirming the judgment and decree of the district court of the fourth judicial district of the Territory of Oklahoma in and for Pawnee county, being the court from which proceedings in error were prosecuted to said supreme court. That the matter in controversy in

said suit exceeds the sum of five thousand dollars, exclusive of costs; and that said cause is a proper one to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed in the above entitled cause to the Supreme Court of the United States; and that an order issue directing the clerk of the supreme court of the Territory of Oklahoma to send the record and proceedings in said cause, with all things concerning the same, to the said Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States; and also that an order be made fixing the amount of security which appellant shall give and furnish upon such appeal; and upon the giving of such security all further proceedings in this court be superseded and stayed until determination of the said appeal by the said Supreme Court of the United States; and your petitioner will ever pray, etc.

WRIGHTSMAN & FULTON,
Attorneys for Appellant.

2 Said petition is endorsed as follows:

#1157—In the supreme court of the Territory of Oklahoma—J. O. Comstock *v.* Wm. L. Eagleton—Petition for appeal.—Wrightsman & Fulton, att'ys for appellant.—Filed June 10, 1903, Benj. F. Hegler, clerk supreme court.

3 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Appellant,
vs.
WM. L. EAGLETON, Appellee. } Case No. 1157.

Assignment of Error-.

J. O. Comstock, appellant in this action, in connection with, and as a part of his petition for an appeal, filed herein, makes the following assignment of errors, which he avers were committed by the supreme court of the Territory of Oklahoma in the rendition of the judgment and final decree herein against this appellant, as appears upon the record herein. That is to say:

I. The said court erred in holding and deciding that the petition in said cause did not state facts sufficient to constitute a cause of action against the appellee, defendant in the court below.

II. The court erred in sustaining the demurrer of the appellee to the petition of the appellant.

III. The court erred in rendering judgment against this appellant upon the sustaining of the said demurrer of the appellee.

IV. The court rendered judgment against the appellant, whereas

judgment ought to have been rendered in favor of this appellant, and against the appellee.

V. The court erred in affirming the judgment and order of the trial court in sustaining the demurrer to the petition.

VI. The court erred in affirming the judgment and order of the trial court in dismissing the said action.

VII. The court rendered judgment affirming the judgment and decision of the court below, when it should have rendered a judgment reversing the judgment and decision of the court below,

4 and granted this appellant a new trial.

Wherefore, the said J. O. Comstock, appellant, prays that final decree and judgment of the supreme court of the Territory of Oklahoma rendered in this cause be reversed. That such direction be given that full force and efficacy may inure to said appellant by virtue of the cause of action set out in his petition in said cause; and that said supreme court of the Territory of Oklahoma be ordered and directed to enter a decree reversing and setting aside the order and judgment of the district court of the fourth judicial district of the Territory of Oklahoma in and for Pawnee county, in said cause; and that this appellant be granted a new trial therein.

J. O. COMSTOCK,
By WRIGHTSMAN & FULTON,
His Attorneys.

Endorsed: # 1157, In the supreme court of the Territory of Oklahoma—J. O. Comstock *v.* Wm. L. Eagleton—Assignment of error.—Wrightsman & Fulton, att'ys for appellant—Filed June 10, 1903, Benj. F. Hegler, clerk supreme court.

5 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Appellant,
vs.
WM. L. EAGLETON, Appellee. } Case No. 1157.

Showing of Amount in Controversy.

TERRITORY OF OKLAHOMA, }
County of Logan, } *ss:*

E. L. Fulton being first duly sworn upon oath deposes and says: That he is one of the attorneys for the appellant above named; that the actual amount in controversy and in dispute in said action exceeds the sum of five thousand dollars ($5,000.00) exclusive of costs; that this affidavit is made by affiant upon his own personal knowledge and for the benefit of said appellant.

E. L. FULTON.

Subscribed and sworn before me this 10th day of June, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court.

[SEAL.]

Endorsed: 1157—J. O. Comstock *vs.* Wm. L. Eagleton—Affidavit showing amount in controversy—Filed June 10, 1903, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

6 Know all men by these presents: That we, J. O. Comstock, as principal and American Bonding Company of Baltimore as sure*ties*. are held and firmly bound unto Wm. L. Eagleton in the full and just sum of three hundred ($300.00) dollars, to be paid to the said Wm. L. Eagleton, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 22nd day of June, A. D. *in the year of our Lord* one thousand nine hundred and three.

Whereas, lately in the supreme court of the Territory of Oklahoma, in a suit pending in said court between J. O. Comstock, plaintiff in error, and Wm. L. Eagleton, defendant in error, a decree was rendered against the said J. O. Comstock; and the said J. O. Comstock having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Wm. L. Eagleton, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, within thirty days from the 10t day of June, 1903, the same being the date of the issuing of said writ.

Now the conditions of the above obligation is such that if the said J. O. Comstock shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void, else to remain in full force and virtue.

J. O. COMSTOCK,
By C. J. WRIGHTSMAN, *His Attorney.*

[SEAL.]

AMERICAN BONDING COMPANY
OF BALTIMORE.
By CHARLES H. WOODS, *Vice-Pres't.*

Attest: E. F. STEEN, *Ass't Sec'y.*

Signed and delivered in the presence of
C. J. WRIGHTSMAN.
L. T. WILSON.

Approved by me this 7 day of July, 1903.

B. F. BURWELL,
Associate Justice of the Supreme Court of the Territory of Oklahoma.

Endorsed: 1157—Comstock *vs.* Eagleton—Bond—Filed July 8, 1903. Benj. F. Hegler, clerk supreme court.

7 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Appellant,
vs.
WM. L. EAGLETON, Appellee. } Case No. 1157.

Order.

On reading and filing the petition of J. O. Comstock, appellant, for an order allowing appeal and the assignment of errors herein made and filed by the said J. O. Comstock, it is ordered that an appeal to the Supreme Court of the United States of America from the final decree heretofore made, entered and filed herein on the 16th day of July, 1902, be and the same is hereby allowed; and the clerk of this court is hereby directed to forthwith transmit to the Supreme Court of the United States of America, a transcript of the record in said cause, said record to consist of a printed copy of the transcript of the record heretofore used on the proceedings in error from the district court of the fourth judicial district of the Territory of Oklahoma, in and for Pawnee county, together with a transcript of all proceedings had and taken in the case subsequent to said appeal.

It is further ordered that the amount of security upon appeal herein to be furnished by the said J. O. Comstock be and the same is hereby fixed at the sum of $300; and that upon the making and filing with the clerk of this court of a good and sufficient bond in said sum by the said J. O. Comstock, all further proceedings, including execution on said final decree, be superseded and stayed until the final determination of said appeal by the said Supreme Court of the United States, until the further order of this court.

8 Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, and the seal of said court, this 10 day of June, in the year of our Lord one thousand nine hundred and three.

JNO. H. BURFORD,
Chief Justice.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court of the Territory of Oklahoma.*

Endorsed: # 1157—In the supreme court of the Territory of Oklahoma—J. O. Comstock *vs.* Wm. L. Eagleton—Order of appeal—Filed June 10, 1903, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

9 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } 1157. Petition in Error.

The said J. O. Comstock, plaintiff in error, complains of said defendant in error, for that the said Wm. L. Eagleton, at the November 1900 term of the district court of Pawnee county, Oklahoma Territory, recovered a judgment by the consideration of said court, of dismissal of an action instituted by the plaintiff in error, against the said Wm. L. Eagleton, in a certain action then pending in the said court wherein the said J. O. Comstock was plaintiff, and the said Wm. L. Eagleton was defendant. The original case made, duly certified and attested, in said cause, is hereto attached, marked "Exhibit A," and made a part of this petition in error; and the said J. O. Comstock avers that there is error in the said record and proceedings, in this, to-wit:

I. The court erred in sustaining the demurrer of the defendant to the amended petition of the plaintiff.

II. The court erred in dismissing the said action.

III. The court erred in entering judgment against the plaintiff for the costs of said action.

Wherefore plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and a new trial granted in said cause; and for such other and further relief as justice may require.

C. J. WRIGHTSMAN,
Att'y for Plaintiff in Error.

Filed Nov. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

10 In the District Court of Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant. } No. 571. Case-made.

Be it remembered, that on this 11th day of October, A. D. 1900, the plaintiff herein J. O. Comstock, brings his action against the defendant herein Wm. L. Eagleton, by filing his petition in the above entitled cause in the district court of Pawnee county, Oklahoma Territory, which petition is in words and figures as follows, towit:—

11 In the District Court within and for Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant. } Petition.

Plaintiff for cause of action against defendant, alleges:

First. That the said defendant is now and was at all times hereinafter named, the duly qualified and acting probate judge within and for Pawnee county, Oklahoma Territory.

Plaintiff further states that on the 7th day of February, 1900, in the probate court within and for Pawnee county, Oklahoma Territory, the defendant, Wm. L. Eagleton, then and there sitting and acting as the sole and presiding judge of said court, rendered a judgment against the plaintiff in a certain bastardy proceeding then pending in the said probate court of the county of Pawnee, and the Territory of Oklahoma, wherein The Territory of Oklahoma was plaintiff and J. O. Comstock was defendant, by the terms of which judgment amongst other things, the said Wm. L. Eagleton, as judge of said court, ordered that J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma, to be by him committed to the common jail of Pawnee county, O. T., until the costs of said prosecution in the sum of $104.20 be paid, and until the said J. O. Comstock should furnish a bond to the Territory of Oklahoma, with good and sufficient sureties, to be approved by the judge of the probate court of Pawnee county, Oklahoma Territory, providing that the said J. O. Comstock should pay the sum
12 of $5.00 per month, on the first day of each and every month, commencing on the first day of March, 1900, for each and every month thereafter for the term of four years; that a copy of said judgment is hereto attached, marked "Exhibit A," and made a part hereof.

Plaintiff further states that on the 9th day of February, 1900, the said defendant Eagleton issued a warrant of commitment to T. M. Grant, as the sheriff of Pawnee county, Oklahoma Territory, upon said judgment above named, which said warrant of commitment is in words and figures as follows, to-wit:

In the Probate Court.

Territory of Oklahoma to the sheriff of Pawnee county, in said Territory of Oklahoma, Greeting:

You, the said sheriff, are hereby commanded to take into your custody the body of J. O. Comstock, who was, on the 29th day of November, 1899, charged by a complaint in the probate court in and for Pawnee county, Oklahoma Territory, of the offense of bas-

tardy, and was thereafterwards arraigned in open court and entered a plea of not guilty, and thereafterwards to-wit, on the 7th day of February, 1900, he, the said J. O. Comstock, was tried in the probate court in and for the said county for the offense of bastardy and was, by *by* the jury impaneled and sworn to try the said cause, found guilty of said offense, which said verdict of the jury was returned into open court, the defendant being at the time present in person and by attorney. The defendant was thereafterwards, to-wit, on the 7th day of February, 1900, sentenced by the court in open court, in Pawnee county, Oklahoma Territory, to pay the sum of $840.00 for the maintenance of the bastard child of Maud Williams, — which he had been found by the jury to be the father.

It was further ordered that this amount be paid by the de-
13 fendant, J. O. Comstock, to the mother of said minor at the rate of $5.00 per month, on the first day of each and every month commencing on the first day of March, 1900, until said amount of $840.00 was duly and fully paid.

It was further ordered by the court that the defendant J. O. Comstock enter into a bond to the Territory of Oklahoma with good and sufficient sureties, to be approved by the judge of the probate court in and for the county of Pawnee, Oklahoma Territory, to secure the performance of this sentence, or order, for the first four years commencing on the first day of March, 1900.

It was further ordered by the court that the defendant J. O. —— enter into a bond to the Territory of Oklahoma, without sureties, for the faithful performance of the rest of the time covered by this said sentence.

It was further ordered by the court that the defendant J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county, until the bonds above mentioned are made and approved, and the costs of the prosecution paid.

And you, the said sheriff of Pawnee county, are hereby commanded to safely keep said J. O. Comstock until the bonds above mentioned are duly made and approved by the judge of the probate court and until he pays the costs of this prosecution, or until he shall be discharged therefrom by due course of law.

In testimony whereof I have hereunto set my hand and official seal this 9th day of February, 1900.

[SEAL.] WM. L. EAGLETON,
Probate Judge of Pawnee County, Oklahoma Territory.

14 Plaintiff further states that under and by virtue of said order of commitment to the said sheriff of Pawnee county, Oklahoma, the said defendant Eagleton did therein and thereby request, direct, instigate, cause and procure the said J. O. Comstock to be imprisoned and deprived of his liberty by the said sheriff of Pawnee county, Oklahoma, who under the said order of commitment, on the 9th day of February, 1900, took plaintiff into his custody,

and unlawfully and with force, and without authority of law, kept, detained and imprisoned him for the space of 117 days immediately following said date. That the said warrant of commitment issued by the said Eagleton as probate judge aforesaid, is void on its face; and that for no other cause was said J. O. Comstock imprisoned and restrained of his liberty than that set forth in said commitment.

Second. That by virtue of defendant's procurement of plaintiff's unlawful imprisonment as herein alleged, plaintiff incurred an expense of $300.00 in counsel fees, and $17.50 additional for briefs in the supreme court, in obtaining a discharge from said unlawful imprisonment by order of the supreme court of the Territory of Oklahoma.

Third. Plaintiff further states that by virtue of defendant's procurement of plaintiff's unlawful imprisonment as herein alleged, during the said 117 days he was forced and compelled to breathe foul and fetid air in said jail, and endured great physical suffering and sickness in consequence of said unlawful imprisonment, thereby to his damage in the sum of $2500.00.

Plaintiff further states that by virtue of his wrongful and unlawful imprisonment at defendant's instigation and procurement as herein alleged, for the time of 117 days, he suffered indignity, shame, humiliation and disgrace, being kept during said time with convicts, thieves and other criminals of low and depraved nature,—
15 and thereby to the plaintiff's further damage in the sum of $2500.00.

Fifth. Plaintiff further alleges that by virtue of said wrongful and unlawful imprisonment for the said time of 117 days at the instigation and procurement of defendant as herein alleged, plaintiff was prevented from engaging in work, labor or business, and to his damage thereby in the sum of $100.00.

Wherefore, plaintiff prays judgment against said defendant for damages in the sum of $5317.50, as in his petition set forth, besides costs of suit.

C. J. WRIGHTSMAN,
Attorney for Plaintiff.

16 EXHIBIT A.

In the Probate Court within and for Pawnee County, Oklahoma Territory.

TERRITORY OF OKLAHOMA, Plaintiff,
vs.
J. O. COMSTOCK, Defendant. } Journal Entry.

Now on this 7th day of February, 1900, it being one of the regular judicial days of the January, 1900 term of the probate court in and for Pawnee county, Oklahoma Territory, this matter coming on for sentence upon the verdict rendered by the jury in said cause on the

6th day of February, 1900. The Territory appearing by the county attorney, E. M. Clark, and the defendant appearing in person and also by his attorney C. J. Wrightsman, and no legal reasons being offered why sentence should not be pronounced at this time, and the court being fully advised in the premises, is of the opinion that the defendant is guilty as charged and as found by the jury in said case.

It is therefore, considered, ordered and adjudged by the court that the defendant J. O. Comstock, be and he is hereby sentenced to pay the sum of $840.00 for the maintenance of the bastard child of Maude Williams of which he has been found by the jury to be the father.

It is further ordered that this amount be paid by the said defendant J. O. Comstock, to the mother of the said minor at the rate of $5.00 per month on the first day of each and every month commencing on the first day of March, 1900, until the said amount above mentioned is duly and fully paid.

17 It is further ordered by the court that the defendant enter into a bond to the Territory of Oklahoma with good and sufficient sureties to be approved by the judge of the probate court in and for Pawnee county, Oklahoma Territory, to secure the performance of this sentence for the first four years commencing on the first of March, 1900.

It is further ordered by the court that the defendant, J. O. Comstock, enter into a bond to the Territory of Oklahoma without sureties for the faithful performance of the rest of the time covered by this said sentence.

It is further ordered by the court that the defendant pay the costs of this prosecution taxed in the sum of $104.20.

It is further ordered by the court that the defendant J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county, until the bonds above mentioned are made and approved and the costs of this prosecution paid, to all of which judgment and sentence the defendant duly excepts and gives oral notice of appeal.

WM. L. EAGLETON,
Probate Judge.

[SEAL.]

Which petition is endorsed on the back in words and figures as follows, to-wit:—

Case No. 571. Civil. In district court. J. O. Comstock, plaintiff *vs.* Wm. L. Eagleton, defendant. Petition. Filed on this 11 day of October, 1900. Jay E. Pickard, clerk. By C. W. Bacon, deputy. C. J. Wrightsman, attorney for plaintiff.

18 And thereupon on the same date, to-wit, the 11th day of October, A. D. 1900, the plaintiff herein files his pr a ci for summons, which is in words and figures as follows, to-wit:—

District Court, Fourth Judicial District, Territory of Oklahoma, in and for Pawnee County.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant.

To the clerk of said court:

Please issue summons in the above entitled cause and direct the same to the sheriff of Pawnee county, Territory of Oklahoma, to or for the defendants Wm. L. Eagleton. Amount claimed, $5317.50 and interest from — day of —— 1— at — per cent. per annum.

Action brought for damages for false imprisonment.

Make summons returnable 13th day of October, 1900.

Defendant required to answer on or before 2nd day of November, A. D. 1900.

Dated this 11th day of October, A. D. 1900.

C. J. WRIGHTSMAN,
Attorney for Plaintiff.

Which præcipe is endorsed on the back in words and figures as follows, to-wit:—

571. Præcipe. District court, Pawnee county. J. O. Comstock, plaintiff, *vs.* Wm. L. Eagleton, defendant. Præcipe for summons. Filed Oct. 11, 1900. Jay E. Pickard, clerk, by C. W. Bacon, deputy.

19 And thereupon, on to-wit, the 11th day of October, A. D. 1900, the clerk of the district court of Pawnee county, Oklahoma Territory, in compliance with said præcipe, issues a summons thereon, which summons is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Territory of Oklahoma, Pawnee County, } ss:

In the District Court of Pawnee County, Oklahoma Territory, Fourth Judicial District.

The Territory of Oklahoma to the sheriff of Pawnee county, in said Territory, Greeting:

You are hereby commanded to notify Wm. L. Eagleton that he has been sued by J. O. Comstock in the district court in and for the said county of Pawnee, and that unless he answer by the 2nd day of November, A. D. 1900, the petition of the said J. O. Comstock against him filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 13th day of October, A. D. 1900.

Witness my hand and the seal of said court, affixed at my office in Pawnee this 11th day of October, A. D. 1900.

JAY E. PICKARD, *Clerk*,
[SEAL.] By C. W. BACON, *Deputy*.

Suit brought for damages for false imprisonment.

If the defendant fail to answer, judgment will be taken for the sum of $5317.50 [with interest at the rate of]* — per cent. per annum from the — day of —— 190– and cost of suit.

JAY E. PICKARD,
Clerk District Court,
By C. W. BACON, *Deputy*.

20 TERRITORY OF OKLAHOMA, } ss:
Pawnee County, }

Received this writ Oct. 11, 1900, and, as commanded therein, I summoned the following persons of the defendants within named at the times following, to-wit: Wm. Eagleton Oct. 12, 1900, by delivering to said defendant, personally in said county, a true and certified copy of the within summons, with all the endorsements thereon.

Sheriff's Fees.

Service and return first person.....	$ .50
Total.....	.50

T. M. GRANT, *Sheriff*,
By T. M. JOHNSON, *Deputy*.

Summons endorsed as follows:

Summons. No. 571. Ap. doc. 571 page 571. District court, Pawnee county, Oklahoma Territory. J. O. Comstock *vs.* Wm. L. Eagleton. Issued Oct. 11, 1900. Returnable Oct. 13, 1900. Ans. due Nov. 2, 1900. Filed Oct. 12, 1900. Jay E. Pickard, clerk. By C. W. Bacon, deputy.

21 And thereafter, on to-wit, the 2nd day of November, A. D. 1900, the defendant herein, Wm. L. Eagleton, files his motion to make the plaintiff's petition more definite and certain, which motion is in words and figures as follows, to-wit:—

[* Words enclosed in brackets erased in copy.]

TERRITORY OF OKLAHOMA, }
County of Pawnee. }

In the District Court.

J. O. COMSTOCK }
vs. } Motion.
W. L. EAGLETON. }

Comes now the defendant by his attorneys Lewis P. Mosier and A. J. Biddison, and moves the court to require the plaintiff to make his petition more definite, specific and certain in this, to-wit:—

1st. That he be required to state specifically the nature of the proceedings by which the plaintiff was committed to the common jail of Pawnee county.

LEWIS P. MOSIER AND
A. J. BIDDISON,
Attorneys for Defendant.

Which motion is endorsed on the back in words and figures as follows, to-wit:

571. In the district court. J. O. Comstock *vs.* W. L. Eagleton. Motion to make definite and certain. Filed Nov. 2, 1900. Jay E. Pickard, clerk. By C. W. Bacon, deputy.

22 And thereafter, on to-wit, the 8th day of November, 1900, the plaintiff herein files his motion to strike the defendant's motion from the files, which motion is in words and figures as follows, to-wit:—

In the District Court within and for Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff, }
vs. } Motion to Strike from Files, etc.
WM. L. EAGLETON, Defendant. }

Comes now the above named plaintiff and moves the court to strike from the files in said cause the defendant's motion asking that plaintiff's petition be made more definite and certain etc. for the following reasons to-wit:

1st. That said motion was filed more than twenty days from and after return day of the summons in said cause.

2nd. Because said motion is frivolous, and filed out of time, without leave of court.

C. J. WRIGHTSMAN,
Attorney for Plaintiff.

Which motion is endorsed on the back in words and figures as follows, to-wit:

571. J. O. Comstock, *vs.* Wm. L. Eagleton. Motion. Filed Nov. 8, 1900. Jay E. Pickard, clerk. By C. W. Bacon, deputy.

23 And thereafter, on to-wit, the 9th day of November, 1900, the plaintiff withdraws his motion to strike from the files etc., by leave of court first had and obtained.

And thereupon, the defendant moves the court for permission to file an amended motion to make the plaintiff's petition more definite and certain, and the defendant is by the court granted leave to file an amended motion to make the petition more definite and certain in twenty four hours.

And thereafter on to-wit, the 12th day of November, 1900, the defendants are by the court given until November 13, 1900, to file their motion to make more definite and certain,

And thereafter on the 13th day of November, A. D. 1900, the defendant herein files his motion to make more definite and certain, which motion is in words and figures as follows, to-wit:—

24 TERRITORY OF OKLAHOMA, } ss:
County of Pawnee, }

In the District Court.

J. O. COMSTOCK, Plaintiff, } Amended Motion to Make
vs. Definite and Certain.
WM. L. EAGLETON, Defendant. }

Comes now the defendant and moves the court to require the plaintiff to make his petition herein more specific, definite and certain in this, to-wit:

1st. That he be required to state whether the judgment referred to in paragraph one of said petition, was rendered by the probate court or by W. L. Eagleton, judge thereof.

2nd. That he be required to state the nature of the proceedings against him in which the commitment complained of in paragraph one of said petition was issued commit-ing him to the common jail of Pawnee county.

LEWIS P. MOSIER AND
A. J. BIDDISON,
Attorneys for Defendant.

Which motion is endorsed on the back in words and figures as follows, to-wit:

In the district court. J. O. Comstock *vs.* Wm. L. Eagleton. Amended motion to make definite and certain. Filed Nov. 13, 1900. Jay E. Pickard, clerk. By C. W. Bacon, deputy.

25 And thereafter, on to-wit, the 16th day of November, A. D. 1900, the plaintiff, by leave of court first had and obtained, amends his petition, which amended petition is as follows:—

In the District Court in and for Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant. } Amended Petition.

Plaintiff, for cause of action against the defendant, alleges:

"First. That the said defendant is now, and was at all times hereinafter named, the duly qualified and acting probate judge within and for Pawnee county, Oklahoma Territory.

Plaintiff further states that on the 7th day of February, 1900, the probate court in and for Pawnee county, Oklahoma Territory, in which the defendant Wm. L. Eagleton was then and there sitting and acting as the sole and presiding judge thereof, rendered a judgment against the plaintiff in a certain bastardy proceeding then pending in the said probate court of the county of Pawnee and Territory of Oklahoma, wherein The Territory of Oklahoma was plaintiff and J. O. Comstock was defendant, by the terms of which judgment, amongst other things, the said court ordered that J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma, to be by him committed to the common jail of Pawnee county, O. T. until the costs of said prosecution in the sum of $104.20 be paid, and until the said J. O. Comstock should furnish a bond to the Territory of Oklahoma, with good and sufficient sureties, to be approved by the judge of the probate court of Pawnee county, Oklahoma
26 Territory, providing that the said J. O. Comstock should pay the sum of $5.00 per month, on the first day of each and every month, commencing on the first day of March, 1900, for each and every month thereafter for the term of four years;" that a copy of said judgment is hereto attached marked "Exhibit A," and made a part hereof.

Plaintiff further states "that on the 9th day of February, 1900, the said defendant Eagleton issued a warrant of commitment to T. M. Grant as the sheriff of Pawnee county, Oklahoma, upon said judgment above named, which said warrant of commitment is in words and figures as follows, to-wit:"

In the Probate Court.

Territory of Oklahoma to the sheriff of Pawnee county, in said Territory of Oklahoma, Greeting:

You, the said sheriff, are hereby commanded to take into your custody the body of J. O. Comstock, who was, on the 29th day of

November, 1899, charged by a complaint in the probate court in and for Pawnee county, Oklahoma Territory, of the offence of bastardy, and was thereafter arraigned in open court and entered a plea of not guilty, and thereafterwards, to-wit, on the 7th day of February, 1900, he, the said J. O. Comstock, was tried in the probate court in and for said county for the offence of bastardy and was by the jury, empaneled and sworn to try said cause, found guilty of said offence, which said verdict of the said jury was returned into open court, the defendant being at the time present in person and by attorney. The defendant was thereafterwards, to-wit, on the 7th day of February, 1900, sentenced by the court, in open court in Pawnee, Pawnee county, Oklahoma Territory, to pay the sum of $840.00 for the maintenance of the said bastard child of Maud Williams, — which he had been found by the jury to be the father.

It was further ordered that this amount be paid by the defendant,
J. O. Comstock, to the mother of said minor at the rate of
27 $5.00 per month, on the first day of each and every month
commencing on the first day of March, 1900, until said amount of $840.00 was duly and fully paid.

It was further ordered by the court that the defendant J. O. Comstock, enter into a bond to the Territory of Oklahoma with good and sufficient sureties, to be approved by the judge of the probate court in and for the county of Pawnee, Oklahoma Territory, to secure the performance of this sentence, or order, for the first four years commencing on the first day of March, 1900.

It was further ordered by the court that the defendant, J. O. Comstock, enter into a bond to the Territory of Oklahoma, without sureties, for the faithful performance of the rest of the time covered by this said sentence.

It was the further order of the court that the defendant J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county, until the bonds above mentioned are made and approved, and the costs of the prosecution paid.

And you, the said sheriff of Pawnee county, are hereby commanded " to safely keep said J. O. Comstock until the bonds above mentioned are duly made and approved by the judge of the probate court and until he pay the costs of the prosecution, or until he shall be discharged therefrom by due course of law."

In testimony whereof I have hereunto set my hand and official seal this 9th day of February, 1900.

[SEAL.] WM. L. EAGLETON,
Probate Judge of Pawnee County, Oklahoma Territory.

Plaintiff further states " that *under* and *by virtue* of *said order of commitment* to the said sheriff of Pawnee county, Oklahoma,
28 the said defendant Eagleton did therein and thereby request, direct, instigate, cause and procure the said J. O. Comstock to be imprisoned and deprived of his liberty by the said sheriff of

Pawnee county, Oklahoma, who, under the said order of commitment, on the 9th day of February, 1900, took the plaintiff into his custody, and unlawfully and with force, and without any authority of law, kept, detained and imprisoned him for the space of 117 days immediately following said date. That the said warrant of commitment issued by the said Eagleton as probate judge aforesaid is void on its face; *and that for no other cause was said J. O. Comstock imprisoned and restrained of his liberty than that set forth in said commitment.*"

Second. That by virtue of defendant's procurement of plaintiff's unlawful imprisonment as herein alleged, plaintiff incurred an expense of $300.00 in counsel fe-s, and $17.50 additional for briefs in the supreme court, in proceedings in said court to obtain a discharge from said unlawful imprisonment.

Third. Plaintiff further states that by virtue of defendant's procurement of plaintiff's unlawful imprisonment as herein alleged during the said 117 days, he was forced and compelled to breathe foul and fetid air in said jail, and endured great physical suffering and sickness in consequence of said unlawful imprisonment, thereby to his damage in the sum of $2500.00.

Fourth. Plaintiff further states that by virtue of his wrongful and unlawful imprisonment at defendant's instigation and procurement as herein alleged, for the time of 117 days, he suffered indignity, shame, humiliation and disgrace, being kept during said time with convicts, thieves, and other criminals of low and depraved nature,—and thereby to plaintiff's further damage in the sum of $2500.00.

29 Fifth. Plaintiff further alleges that by virtue of said wrongful and unlawful imprisonment for the said time of 117 days at the instigation and procurement of defendant as herein alleged, plaintiff was prevented from engaging in work, labor and business, and to his damage thereby in the sum of $100.00.

Wherefore, plaintiff prays judgment against the defendant for damages in the sum of $5317.50, as in his petition set forth, besides costs of suit.

C. J. WRIGHTSMAN,
Attorney for Plaintiff.

30 In the Probate Court within and for Pawnee County, Oklahoma Territory.

TERRITORY OF OKLAHOMA, Plaintiff,
vs.
J. O. COMSTOCK, Defendant. } Journal Entry.

" Now on this 7th day of February, 1900, it being one of the regular judicial days of the January, 1900, term of the probate court in and for Pawnee county, Oklahoma Territory, this matter coming

on for sentence upon the verdict rendered by the jury in said case on the 6th day of February, 1900. The Territory appearing by the county attorney, E. M. Clark, and the defendant appearing in person, and also by his attorney, C. J. Wrightsman, and no legal reasons being offered why sentence should not be pronounced at this time and the court being fully advised in the premises is of the opinion that the defendant is guilty as charged and as found by the jury in said case.

It is therefore, considered, ordered and adjudged by the court that the defendant J. O. Comstock, be and he is hereby sentenced to pay the sum of $840.00 for the maintenance of the bastard child of Maud Williams, of which he has been found by the jury to be the father.

It is further ordered that this amount be paid by the said defendant, J. O. Comstock, to the mother of the said minor at the rate of $5.00 per month on the first day of each and every month commencing on the first day of March, 1900, until said amount above mentioned is duly and fully paid.

It is further ordered by the court that the defendant enter into a bond to the Territory of Oklahoma with good and sufficient sureties to be approved by the judge of the probate court in and for Pawnee county, Oklahoma Territory, to secure the performance of this
31 sentence for the first four years commencing on the first of March, 1900.

It is further ordered by the court that the defendant, J. O. Comstock enter into a bond with the Territory of Oklahoma, without sureties for the faithful performance of the rest of the time covered by this said sentence.

It is further ordered by the court that the defendant pay the costs of this prosecution taxed in the sum of $104.20.

It is further ordered by the court that the defendant, J. O. Comstock, be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county, until the bonds above mentioned are made and approved and the costs of this prosecution paid," to all of which judgment and sentence the defendant duly excepts and gives oral notice of appeal.

WM. L. EAGLETON,
Probate Judge.

[SEAL.]

Which amended petition is endorsed on the back in words and figures as follows, to-wit:—

Amended petition. Case No. 571. Civil. In district court. J. O. Comstock, plaintiff, *vs.* Wm. L. Eagleton, defendant. Filed on this 16 day of November, 1900. Jay E. Pickard, clerk. By C. H. Stewart, deputy. C. J. Wrightsman, attorney for plaintiff.

32 And thereafter on, to-wit, the 16th day of November, 1900, the defendant herein files a demurrer to the plaintiff's

amended petition, which demurrer is in words and figures as follows:—

TERRITORY OF OKLAHOMA, } ss:
County of Pawnee, }

In the District Court.

J. O. COMSTOCK }
vs. } Demurrer.
W. L. EAGLETON. }

Comes now the defendant above named and demurs to the petition of plaintiff herein, for the following reason to-wit:

1st. That said petition does not state facts sufficient to constitute a cause of action.

LEWIS P. MOSIER AND
A. J. BIDDISON,
Attorneys for Defendant.

Which demurrer is endorsed on the back in words and figures as follows, to-wit:—

Comstock *vs.* Eagleton. Demurrer. Filed Nov. 16, 1900. Jay E. Pickard, clerk, by C. H. Stewart, deputy.

33 And thereupon said cause comes on for hearing upon the defendant's demurrer to the plaintiff's petition and proceedings were had and done as follows, to-wit:—

In the District Court of Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff, }
vs. } Journal Entry.
WM. L. EAGLETON, Defendant. }

Now on this 16th day of November, 1900, the same being one of the regular judicial days of the November, 1900 term of this court, this cause came on to be heard on the demurrer of the defendant to the amended petition of the plaintiff filed herein, and was submitted to the court. Upon consideration whereof, and the court being fully advised in the premises, does sustain said demurrer, and the plaintiff not desiring to amend his petition, but electing to stand thereon, it is considered and adjudged by the court that the said action be, and the same hereby is dismissed, and that the defendant go hence without day, and recover from the plaintiff his costs herein expended, taxed at $—; to all of which judgments, orders and decrees, the plaintiff, by his attorney, at that time, then and there duly excepted; which said exceptions were allowed by the court.

——— ———,
Judge of the District Court of Pawnee County, O. T.

34 And thereupon, to-wit, on the 16th day of November, 1900, and upon the rendition of the above and foregoing judgment of the court, the plaintiff asks the court that time be granted plaintiff to make and serve a case-made in said cause; and immediately thereupon, on the 16th day of November, 1900, the court orders that in said cause the plaintiff be given twenty days to make and serve a case made, five days to suggest amendments thereto; and it is further ordered that said cause be settled on three days' notice in writing by either party.

35 The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings and proceedings upon which judgment was rendered and thereafter in said cause until the settlement of this case made.

C. J. WRIGHTSMAN,
Att'y for J. O. Comstock.

Filed Nov. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

36 In the District Court in and for Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant. } Notice.

To L. P. Mosier, as attorney for Wm. L. Eagleton, defendant above named:

You are hereby notified, and will take notice, that the above named plaintiff, J. O. Comstock, will, by his undersigned attorney, apply to the Hon. Bayard T. Hainer, judge of the fourth judicial district, at chambers, in the city of Perry, Noble county, fourth judicial district of Oklahoma, upon the 26th day of October, 1901, at the hour of 9 o'clock a. m., or so soon thereafter as counsel can be heard, to sign and settle the case made for the supreme court in the above entitled cause in the district court of Pawnee county, Oklahoma; which case made was duly served upon you the 19th day of November, 1900.

C. J. WRIGHTSMAN,
Attorney for Plaintiff.

Filed Nov. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Pawnee County, }

I hereby accept and acknowledge service of the foregoing notice made upon me this 23rd day of October, 1901.

LEWIS P. MOSIER AND
A. J. BIDDISON,
Attorneys for Defendant, Wm. L. Eagleton.

Filed Nov. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

37 In the District Court in and for Pawnee County, Oklahoma Territory.

J. O. COMSTOCK, Plaintiff,
vs.
WM. L. EAGLETON, Defendant.

TERRITORY OF OKLAHOMA, } ss:
Pawnee County, }

I, L. P. Mosier, as one of the attorneys for the defendant Wm. L. Eagleton, do hereby acknowledge that service of the above and foregoing case made was duly served upon me this 19th day of November, 1900.

LEWIS P. MOSIER,
Attorney for Defendant Eagleton.

Filed November 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

38 TERRITORY OF OKLAHOMA, } ss:
Pawnee County, }

This is to certify that the foregoing above case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such cause; and I hereby settle, allow, cer-

tify and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at the city of Newkirk, Noble county, and within the fourth judicial district of Oklahoma Territory, the 25th day of October, 1901.

BAYARD T. HAINER,
Judge of the District Court.

Attest:

JAY E. PICKARD, *Clerk,*
[SEAL.] By E. A. BURKE, *Deputy.*

Filed Nov. 15, 1901

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

39 And afterwards, at the January term, 1902, on the seventh day of January, 1902, the following proceeding was had in said cause, to-wit:

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } # 1157.

Ordered by the court: That this cause be now continued as per stipulation.

40 And afterwards, to-wit, at the June, 1902, term of the supreme court, on the second day of June, 1902, the following proceeding was had in said cause, to-wit:

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } # 1157.

Ordered by the court: That this cause be now taken on briefs.

41 And afterward, to-wit, at the June, 1902, term of said supreme court, on the third day of June, 1902, the following proceeding was had in said cause, to-wit:

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } # 1157.

And now motion to dismiss the appeal herein, with suggestions in support thereof, is filed in open court.

Said motion reads in words and figures as follows, to-wit:

42 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Plaintiff in Error,
vs.
W. L. EAGLETON, Defendant in Error. } Case No. 1157.

Motion to Dismiss Appeal.

Now comes the defendant in error by his attorneys and moves the court to strike from the files in this case the case-made for the following reasons, to-wit:

First. Because the same does not show to have been settled as a case-made.

Second. Because the same affirmatively shows that it was not settled and signed as required by law, the order of the district judge or the notice served upon attorney for defendant in error.

Defendant in error further moves the court to dismiss the petition in error in this case because there is no case-made attached thereto as required by law.

A. J. BIDDISON AND
LEWIS P. MOSIER,
Attorneys for Defendant in Error.

Filed June 3, '02.

BENJ. F. HEGLER,
Clerk Supreme Court.

43 And thereafter, at the June, 1902, term of said court, on the sixteenth day of July, 1902, the following proceeding was had in said cause, to-wit:

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } # 1157.

And now this cause comes on for final decision by the court upon the record and briefs of parties submitted therein.

And the court having duly examined the same, and being fully advised in the premises, finds: that the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error, to which plaintiff in error excepts.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error, to which the plaintiff in error excepts.

Opinion by Beauchamp, J.

Which said opinion reads in words and figures as follows, to-wit:

44 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed July 16, 1902.

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } No. 1157.

Syllabus.

1. *Case Made—Notice—Waiver.*—Where the certificate of the judge, who settled and signed the case made, affirmatively shows that the same was submitted to him to be settled and signed by the parties to the cause, at a time and place different from that named in the notice, no objections appearing in the record, and no showing made in this court to the contrary, the notice required will be presumed to have been waived.
2. *Probate Judge—Liability for False Imprisonment.*—A probate judge in passing and rendering judgment in a bastardy case pending in his court acts judicially and is not amenable to a civil action for false imprisonment, though the judgment was erroneous, and in rendering such judgment he erroneously exceeds the jurisdiction of his court.
3. *Ministerial Acts Protected.*—A probate judge issuing a commitment carrying into effect, and supported by a judgment of his court, having jurisdiction of the person and of the subject-matter, will be protected against a civil action for damages for false imprisonment under such commitment.

Error from the district court of Pawnee county.

Bayard T. Hainer, trial judge.

Affirmed.

C. J. Wrightsman, for plaintiff in error.
Lewis P. Mosier and A. J. Biddison, for defendant in error.

Action by J. O. Comstock against Wm. L. Eagleton for false imprisonment. Judgment for defendant upon demurrer to petition, dismissing action, and for costs. Plaintiff here by petition in error for review. The facts will more fully appear in the opinion.

Opinion of the court by BEAUCHAMP, *J.:*

The defendant on the 3rd day of June, 1902, filed a motion in this court to strike from the files the case-made, and to dismiss the petition in error, for the reason that the record affirmatively shows

that the case-made was not settled and signed as required by law, the order of the district judge or the notice served upon the defendant's attorney.

The record discloses that upon the rendition of the judgment herein, on the 16th day of November, 1900, on application, the district court ordered that the plaintiff be given twenty days to make and serve a case-made, the defendant five days to suggest amendments thereto, and that the case be settled on three days' notice in writing by either party. The case-made was served upon the defendant's attorney on November 19th, 1900. On the 23rd day of October, 1901, the plaintiff's attorney served notice in writing upon the defendant's attorney, that on the 26th day of October, 1901, at nine o'clock a. m., or so soon thereafter as counsel could be heard, he would apply to the judge at his chambers in the city of Perry, Noble county, to settle and sign the case-made. The certificate of the judge certifies "that the case-made and amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same was duly submitted to me for settlement and signing, as required by law, by the parties to said cause * * *

45 Witness my hand at the city of Newkirk, Noble county, * * * the 25th day of October, 1901."

Where the certificate of the judge, who settled and signed the case-made, affirmatively shows that the same was submitted to him to be settled and signed *by the parties to the cause* at a time and place different from that named in the notice, no objections appearing in the record, and no showing made in this court to the contrary, the notice will be presumed to have been waived. The motion is overruled.

The plaintiff commenced this action in the district court of Pawnee county to recover damages for false imprisonment in the sum of $5317.50, and in his amended petition, for cause of action, alleges: "1st.—That the said defendant is now, and was at all the times hereinafter named, the duly qualified and acting probate judge within and for Pawnee county, Oklahoma Territory.

"Plaintiff further states that on the 7" day of February, 1900, the probate court in and for Pawnee county, Oklahoma Territory, in which the defendant, William L. Eagleton, was then and there sitting and acting as the sole presiding judge thereof, rendered a judgment against the plaintiff in a certain bastardy proceeding then pending in the said probate court of the county of Pawnee, and Territory of Oklahoma, wherein The Territory of Oklahoma was plaintiff and J. O. Comstock was defendant, by the terms of which judgment, amongst other things, the said court ordered that J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma, to be by him committed to the common jail of Pawnee county, O. T., until the costs of said prosecution, in the sum of $104.20, be paid, and until the said J. O. Comstock should furnish a bond to the Territory of Oklahoma, with good and sufficient sure-

ties, to be approved by the judge of the probate court of Pawnee county, Oklahoma Territory, providing that the said J. O. Comstock should pay the sum of $5.00 per month, on the first day of each and every month, commencing on the first day of March, 1900, for each and every month thereafter for the term of four years." A copy of the judgment is attached to the petition as an exhibit.

"Plaintiff further states that on the 9th day of February, 1900, the said defendant, Eagleton, issued a warrant of commitment to T. M. Grant, as the sheriff of Pawnee county, Oklahoma, upon said judgment above named." (Then follows the commitment which recites the charge in the complaint in the probate court, the arraignment, plea of the defendant, trial, verdict of the jury, sentence and judgment of the court, and commands the sheriff of Pawnee county "to safely keep said J. O. Comstock until the bonds above mentioned are duly made and approved by the judge of the probate court and until he pay the costs of the prosecution, or until he shall be discharged therefrom by due process of law."

"And plaintiff further states that *under and by virtue of said order of commitment* to the said sheriff of Pawnee county, Oklahoma, the said defendant Eagleton did therein and thereby request, direct, instigate, cause and procure the said J. O. Comstock to be imprisoned and deprived of his liberty by the said sheriff of Pawnee county, Oklahoma, who, under the said order of commitment, on the 9th day of February, 1900, took the plaintiff into his custody, and lawfully and with force, and without any authority of law, kept, detained and imprisoned him for the space of 117 days immediately following said date. That the said warrant of commitment issued by the said Eagleton as probate judge aforesaid is void on its face; and that for no other cause was said J. O. Comstock imprisoned and restrained of his liberty than that set forth in said commitment." The- follows allegations of damages.

The defendant demurred to the petition for the reason that the same does not state facts sufficient to constitute a cause of action. The court, upon consideration, sustained the demurrer, and the plaintiff electing to stand on his petition, dismissed the action and adjudged the costs to the plaintiff, to which action and judgment of the court the plaintiff excepted, and brings the case here by petition in error for review.

It is admitted by plaintiff in error, in his brief, that in the case complained of, the probate court of Pawnee county, of which defendant in error was, at the time, the presiding judge, had jurisdiction both of the subject-matter and of the person of the defendant; that the trial of said cause was conducted in strict conformity to law;

46 and that the judgment rendered therein was valid and binding, except that portion thereof which reads: "It is a further order of the court that the defendant J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county until the bonds above mentioned are made and approved,

and the costs of the prosecution paid." This, he contends, was in excess of the jurisdiction of the probate court, therefore void, and that a commitment issued thereunder was without authority and void.

Under what circumstances can a judge of the probate court be held liable to a civil action for damages for an act done by him in his capacity as judge? Nothing is more essential and important than that the judiciary shall be independent. Every judge should feel perfectly free to follow the dictates of his own judgment; and the one thing essential to that independence is that they shall not be exposed to a private action for damages for anything that they may do in their official capacity. No judge would feel free if he knew that upon the rendition of a judgment or order that he might be subjected to a suit by the defeated party, and in the event that it should be held erroneous, and that he had mistakenly exceeded his jurisdiction and powers in some particular, be mulcted in damages.

In this case it is admitted that the probate court had jurisdiction of the subject-matter of the action and of the person, and that the trial of the cause was conducted in strict conformity to law, but that the court erroneously exceeded its jurisdiction in one particular, and, therefore, that the judge should be held liable in damages for the execution thereof.

In the case of Randall *v.* Brigham, 7th Wall. 535, the court says: "Now it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction."

In the case of Bradley *v.* Fisher, 13th Wall. 335, the court held that judges of courts of record, of superior or general jurisdiction, are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. These cases are cited and approved by Brewer, J., in Cooke *v.* Bangs, 31st Federal Rep. 643; and it is said that the rule that justices, as well as all other judicial officers, are exempt from liability to an action for damages for acts done within their jurisdiction, is made clearer by the dissenting opinion of Mr. Justice Davis, with whom concurred Mr. Justice Clifford:

"'I agree that judicial officers are exempt from responsibility in a civil action for their judicial acts in respect to matters of controversy within their jurisdiction. I agree further, that judges of superior or general authority are equally exempt from liability, even when they have exceeded their jurisdiction, unless their acts complained of were done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present where it is alleged, not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly.'"

In this case a distinction is drawn between a case where a justice of the peace is acting simply in excess of his jurisdiction, and one in

which he attempts to act in respect to a subject-matter of which he clearly has no jurisdiction. And it is said :

"A distinction must be here observed between excess of jurisdiction and a clear absence of all jurisdiction over the subject-matter. Where there is clearly no authority over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other question involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend. * * * Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction
47 shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

Many more authorities might be cited holding the same rule, but we deem it unnecessary. The probate court in this case not only had the power and jurisdiction to require the defendant to secure the performance of the order of the court, but it was a duty.—Sec. 2986, Statutes 1893.

The proceedings authorized in such class of cases are special proceedings, and, in many respects, in their nature criminal. The action is commenced upon a complaint duly verified; upon the filing of the complaint a warrant for the arrest of the accused shall be issued; the proceeding shall be entitled in the name of the Territory; the county attorney is required to appear and prosecute; the issue to be tried shall be "guilty" or "not guilty." If a jury be demanded, the cause shall be continued, and the defendant may be admitted to bail. If the accused be found guilty, he shall be charged with the maintenance of the child, and the court shall require the defendant to secure the performance of the order.

Shall the defendant be discharged if he fails to give the bond to appear for trial? If committed to jail and upon trial is found guilty, and he fails to secure the performance of the order of the court, shall he then be discharged? Or shall he be committed until he has complied with the order of the court, or the court has, for sufficient reason, vacated the order or judgment as provided by sec. 2987, *supra?*

These are questions that the defendant as judge was called upon to decide, and until the decision of this court (*In re* Comstock, 10th Oklahoma, 299) had not been construed by this court. The defendant can not be called upon to answer in damages for error of judgment in a judicial construction of a statute, ambiguous as it is.

Probate judges, under the statutes of this Territory, are made the clerks of their respective courts. (Statutes of Oklahoma, sec. A. 1576.)

The plaintiff in error in his brief says that his action is founded upon the "ministerial act of the defendant in issuing the commitment," and attempts to distinguish in that respect, and contends that the defendant is liable for issuing the commitment, even though not liable for rendering the judgment, for, in the one instance he acts judically, while in the other his acts are ministerial.

In the case of Cook *v.* Bangs, *supra*, the defendant was a justice of the peace, and adjudged the defendant in the original action guilty of contempt, upon a complaint alleging failure to sign an appearance bond, as required by the justice, in an action pending before him; the justice, without hearing any evidence, imposed a fine, and ordered that in default of payment that the defendant be committed to the county jail; the defendant refused to pay the fine; a commitment was issued by the justice, and the defendant imprisoned; he was taken before a court commissioner on a writ of *habeas corpus*, who, after due hearing, adjudged that the charge against the petitioner was false, sham, illegal and void, and fully acquitted and discharged the petitioner. That thereupon the justice issued a second commitment for the same charge, and judgment as before, and defendant was incarcerated. Brewer, J., in the opinion, says:

"It is very doubtful whether this action of the justice was not in respect to a subject-matter over which he had no jurisdiction; and yet, while it is doubtful, I still think that the protection which should be accorded to him goes with him in that respect.

"The defendant in this case, in issuing this second warrant, I think, clearly acted erroneously. But the proceeding, although erroneous, was within the limits of a jurisdiction vested in him, for he had jurisdiction over the matter of contempt; and it seems to me that the public policy which requires an independent judiciary, compels that he should be held not amenable to a civil action for damages."

In Downing *v.* Herrick, 47 Me., 462, the court held:

"Since no action will lie against a justice of the peace for an error of judgment while acting judicially and within the scope of his jurisdiction, he cannot be held liable for issuing a mittimus, under which plaintiff was imprisoned, which was issued to make effective a judgment so rendered."

48 The defendant was required to determine whether the facts warranted the issuance of a commitment; the judgment so required; the commitment issued was fully supported by the judgment of the court having jurisdiction of the person and the subject-matter of the action, and was only to carry into effect the provisions thereof; certainly if the judge who rendered the judgment is exempt from liability, the officer who merely issued the process to carry into effect the judgment will be protected.

The judgment of the trial court sustaining the demurrer to the

petition, dismissing the action with costs, under the facts in this case, is right and will, therefore, be affirmed.

Hainer, J., having presided in the court below, not sitting; Irwin, J., absent; all the other justices concurring.

49 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 48 pages, numbered from 1 to 48, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of J. O. Comstock, plaintiff in error, *vs.* Wm. L. Eagleton, defendant in error, No. 1157, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 8th day of July, A. D. 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

50 In the Supreme Court of the Territory of Oklahoma.

J. O. COMSTOCK, Appellant,
vs.
WM. L. EAGLETON, Appellee. } Order.

For satisfactory reasons appearing to the court, the time for filing the record in this cause to the Supreme Court of the United States of America, pursuant to the appeal sued out, is extended until the 30 day of July, 1903.

Done this July 9th, 1903.

B. F. BURWELL,
Asso. Jus. Sup. Ct. of the Ter. of Oklahoma.

51 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } ss:

In the Supreme Court.

J. O. COMSTOCK, Plaintiff in Error,
vs.
WM. L. EAGLETON, Defendant in Error. } No. 1157.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the Honorable Jno. H. Burford, chief justice of said supreme court, was on the ninth day of July, 1903, and fifteen days prior thereto, absent from said Territory.

In witness whereof I hereto set my hand and affix the seal of said supreme court, at Guthrie, this 17th day of July, A. D., 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on cover: File No. 19,048. Oklahoma Territory supreme court. Term No. 105. J. O. Comstock, appellant, *vs.* William L. Eagleton. Filed August 15", 1903. File No. 19,048.